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IN THE

Supreme Court of the United States

October Term, 1970.

No. 1322

COMMONWEALTH OF PENNSYLVANIA,
Petitioner,

v.

MANASEE DAVIS,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA.

JAMES D. CRAWFORD,
Deputy District Attorney,
RICHARD A. SPRAGUE,
First Assistant District Attorney,
ARLEN SPECTER,
District Attorney.

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OPINIONS BELOW.

The opinion of the Court of Common Pleas of Philadelphia County denying respondent's motion to suppress evidence is unreported and is printed at pages 26 to 27 of the Appendix hereto. The opinion of another judge of the same court denying repondent's motions in arrest of judgment and for new trial is unreported and is printed at pages 28 to 30 of the Appendix hereto. The opinion of the Supreme Court of Pennsylvania reversing the judgment of sentence entered by the Court of Common Pleas is reported at 440 Pa. 123 (1970), and is printed at pages 30 to 31 of the Appendix hereto.

JURISDICTION.

The original order of the Pennsylvania Supreme Court was entered on October 9, 1970. Reargument was denied on November 9, 1970. The jurisdiction of this Court is invoked under 28 U. S. C. Sec. 1257(3).

CONSTITUTIONAL PROVISIONS INVOLVED.

The second sentence of Section I of the 14th Amendment to the United States Constitution provides in pertinent part as follows:

> . . . nor shall any State deprive any person of life, liberty, or property, without due process of law . . .

The 5th Amendment to the United States Constitution provides in pertinent part as follows:

> no person . . . shall be compelled in any criminal case to be a witness against himself.

QUESTIONS PRESENTED.

I. When respondent was informed "that anything you say or sign in this statement may be used for or against you at the time of your trial," was the failure of his interrogators to inform him that anything he said "can and will" be used against him or their inclusion of the information that what he said could be used "for" him fatal to the admissibility of his statement under this Court's ruling in *Miranda v. Arizona*?

II. When respondent had a lawyer with whom he had already conferred and by wh ⁻ı he was told of his rights and when his interrogators info med him that he could again consult with his attorney before making a statement and respondent declined to do so, was his statement obtained in violation of *Miranda*?

III. When respondent's confession was obtained before this Court's *Miranda* decision and that decision intervened before trial, and when respondent does not contend and the evidence clearly indicates that the confession did not result from the interrogators deviation from the *Miranda* language, should that confession be held inadmissible merely because the interrogators correctly anticipated the substance of the *Miranda* rules but failed to predict the exact language which that opinion would require?

STATEMENT OF THE CASE.

This petition arises out of the conviction of respondent of first degree murder in the Court of Common Pleas of Philadelphia County. Punishment was fixed by the jury at life imprisonment. The judgment of sentence was reversed and respondent's motion for new trial was granted by the Pennsylvania Supreme Court in a per curiam opinion, two Justices dissenting. *Commonwealth v. Davis*, 440 Pa. 123 (1970). Reargument was sought by the Commonwealth and denied by the Supreme Court of Pennsylvania on November 9, 1970. Review is now sought in this Court.

The facts relevant to this petition are: The deceased, Frank McLaughlin, was a desk clerk at the Glenmore Hotel, 16th and Girard Avenue, Philadelphia, on April 1, 1966. According to the testimony of one Raymond Schaut, who was seated in the hotel lobby, respondent entered the hotel with another male who was later identified as Arthur Hawthorne. Hawthorne shot and killed the desk clerk while respondent approached Schaut and told him, "Get it up." After the shot, respondent and Hawthorne ran from the hotel and were arrested several days later.[1]

Respondent filed an Application to Suppress a Statement given to police following his arrest. The application, heard by the Honorable Bernard J. Kelley, was denied after extensive testimony and argument. The trial judge admitted respondent's statement into evidence. Respondent did not testify or offer evidence at his trial.

On July 6 and 7, 1967, and September 26 and 27 of the same year, an extensive hearing was held before the Honorable Bernard J. Kelley on respondent's motion to suppress the confession. Briefs were filed and, on January 4, 1968, Judge Kelley denied the motion. The factual background of the confession was fully developed at the hearing on the motion to suppress.

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[1] Hawthorne gave police a confession which was suppressed at his trial. Although Hawthorne at his trial was identified by Schaut, he was acquitted by a jury of all charges and discharged from custody.

On Monday, April 4, 1966, on the basis of admitted probable cause, respondent was taken into custody by Officer LoRusso of the Special Investigation Squad inside the Sheriff's Cell Room on the seventh floor of City Hall. Officer LoRusso was told by the sheriff's officer that respondent's lawyer was on his way and LoRusso did nothing until the attorney arrived (N. T. 223).[2] Respondent's attorney, Samuel Lehrer, did arrive and had a telephone conversation with Captain Ferguson of the Special Investigation Squad (N. T. 225). Lehrer gave to LoRusso permission for Captain Ferguson to question respondent (N. T. 225). Lehrer told defendant in LoRusso's presence that the police could talk to him, but that he (respondent) was not to make any statement (N. T. 226). Attorney Lehrer wrote out a piece of paper with two copies (N. T. 134). The paper said:

> Place: Sheriff's cell room, 7th floor, City Hall.
>
> To: Captain Clarence Ferguson.
>
> As I have told you on the telephone, I represent Manasee Davis. He is being taken to you by Policeman LoRusso, No. 2849. My instructions to Davis is not to answer any questions whatsoever. I have told this to Policeman LoRusso as well and ask him to deliver this memo to you. Manasee Davis will also give this to you. If at another time you are willing to tell me in what connection you want Davis and can tell me more than what you did on the phone, I may change my position.
>
> Very truly yours,
>
> Samuel H. Lehrer KI 5-7570.

Respondent was then transported to the Homicide Division at Police Headquarters.

Mr. Lehrer testified to the initial conversation with Officer LoRusso and the telephone conversation with Captain Ferguson (N. T. 130-132). Captain Ferguson invited Mr. Lehrer to come with respondent, but Lehrer did not do so because of appointments in his office and an approaching

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[2] The notes of testimony of the suppression hearing are cited "N. T.," those of the trial as "N. T. Trial."

religious holiday (N. T. 133). Mr. Lehrer told respondent to show the aforementioned note to Captain Ferguson (N. T. 137). Respondent knew Lehrer's home and business phones. Lehrer knew that he would not be at either place that evening, but gave respondent no other telephone numbers (N. T. 147-148). However, Mr. Lehrer testified that he made it clear to respondent that he advised him not to answer questions:

> A. No, I did not. I didn't think it was necessary, because I had given such ample instructions and had gone to such pains to write a note to inform the Police Department and whoever it may concern that I represented Manasee, and that he was not to answer any questions except in my presence; that I thought that anything further was unnecessary.

(N. T. 149.) And again:

> Q. What did you tell him?
>
> A. I told Manasee Davis that when he went down to the police station not to answer any questions unless I was there, and that I was not going to be there that night.

(N. T. 152.)

Mr. Lehrer made very clear that besides giving the paper to respondent he told respondent not to answer any questions (N. T. 157). It is significant that at no time did Mr. Lehrer request the police not to question respondent, or attempt to forbid the police from questioning respondent.

Lehrer's testimony is corroborated by Officer LoRusso:

> The three of us [LoRusso, Lehrer, appellant] were there, and he [Lehrer] told him [appellant]—he said, "I gave him instructions not to make any statements. They can talk to him but not make any statements."

(N. T. 227.)

Sergeant James Lee, then the homicide detective assigned to investigate the robbery-murder of Frank McLaughlin, testified initially about the probable cause, establishing respondent as a participant, the finding of the murder weapon in respondent's apartment a day after the murder

and information leading to the inescapable inference that respondent put it there within minutes after the murder (N. T. 252).

Sergeant Lee related that respondent arrived at the Homicide Division of the Police Administration Building at 4:40 p.m. on April 4, 1966. Respondent was in an interrogation room and a carbon copy of Lehrer's note was on the table in the room (N. T. 256). Sergeant Lee quite correctly told respondent that his lawyer could not give orders to the Police Department. Respondent was immediately advised that he would not be forced in any manner, and that anything he said *would be held against him* (N. T. 258). There was no interrogation.

Respondent was seated alone in a room inside the Homicide Division for the next several hours, during which time he received a meal from the police (N. T. 259). Sergeant Francis Brennan spoke to respondent briefly at about 9:00 p.m.. but not concerning this case and without any attempt at interrogation (N. T. 424). Respondent made several attempts to telephone his attorney, Mr. Lehrer (N. T. 260-261). Sergeant Brennan testified that "the defendant was well aware of the instructions counsel had given to him not to answer questions, and that was his primary reason in trying to get across to consult with his attorney" (N. T. 427). And, "my impression of Manasee Davis is to the effect that he wanted to make a statement and he wanted to reach his attorney" (N. T. 434).

Sergeant Lee began speaking with respondent at about 9:30 p.m., truthfully advising him of the police investigation up to that time. When respondent asked Sergeant Lee if he could see his wife, she was brought into the room and stayed alone with respondent approximately fifteen minutes. She left the room and Sergeant Lee reentered at about 11:35 p.m. (N. T. 264-265). During the next half-hour, respondent voluntarily told Sergeant Lee the events of April 1, 1966 (N. T. 265-266). Respondent then confronted the co-conspirator, Hawthorne, and was allowed to rest, alone, until 3:35 a.m. At that time (the delay due to lack

of manpower among detectives), a formal typewritten statement was taken by Sergeant Brennan and another police officer (N. T. 209). This statement was preceded by warnings as to constitutional rights, as follows:

Question: I am Sergeant Francis Brennan of the Homicide Division, and this is Lieutenant Herbert Lottier #83 of the Special Investigation Squad. At this time I am typing down everything that is said on the typewriter; do you understand?

Answer: Right.

Question: Do you understand that you have a right to remain silent and do not have to say anything unless you choose to do so?

Answer: Yes.

Question: Do you understand that you have the right to consult with an attorney before making any statement?

Answer: Yes.

Question: Do you desire to consult with an attorney at this time before making this statement?

Answer: No.

Question: Are you willing to make a voluntary statement?

Answer: All right.

Question: Do you understand that anything you say or sign in this statement may be used for or against you at the time of your trial?

Answer: Yes.

Question: Are you making this statement of your own free will, without force, fear, threats or promises being made to you?

Answer: Yes.

Question: What is your full name, age and address?

Answer: Manasee Davis, I am 25 years old and I live at 1717 W. Master Street.

(N. T. 422-423.)

Upon questioning by the suppression judge, Sergeant Lee testified that there was no indication to him, from Lehrer's

written note, or from respondent himself, that Lehrer was unavailable that night. Lee added that if the fact of Lehrer's unavailability had been known to him, "I would have taken that into consideration" (N. T. 325). The suppression judge quoted from *Miranda v. Arizona* that if a defendant is alone and does not wish to be interrogated, the police may not question him (N. T. 329). Sergeant Lee testified categorically that respondent never objected to being interrogated (N. T. 330). Further, Lehrer never attempted to prevent the police from questioning respondent.

Most important, respondent testified that he knew he had the right to remain silent (N. T. 125). He claimed that he waived that right because of police threats to his wife. However, the suppression judge did not accept that as a credible explanation, and the testimony of alleged threats was contradicted by the various police officers.

Respondent's theory maintains that his wife had been so oppressed by the police that he confessed only to save her from torture. Necessarily this contention depends upon the credibility of respondent and his wife. Notwithstanding their obvious bias and interest, their testimony is so riddled with internal inconsistencies that it falls by its own weight. In addition, their testimony is contradicted by many police officers, including Sergeant Lee and Lieutenant Brennan.

Appellant, Manasee Davis, testified initially concerning the circumstances by which he was taken into custody, appearing late for a trial scheduled on April 4, 1967, in City Hall. Davis acknowledged talking to his attorney, Samuel Lehrer, Esquire, but asserted that he received no instructions from Lehrer, only a note (N. T. 36) (D-1). This of course contradicts Mr. Lehrer's testimony (N. T. 149-152), quoted above, that he specifically told respondent not to answer questions.

Respondent contended that he made an incriminating statement to the police only because his wife had told him of her alleged mistreatment by police and because he was "concerned about my wife and kids" (N. T. 46, 125). Re-

spondent at first said he read the statement (N. T. 47), but later denied that he read the statement (N. T. 70, 94, 125). Lieutenant Brennan (N. T. 436) and Captain Lottier (N. T. 492) both testified that respondent read the statement. These contradictions highlight the unavoidable inference that respondent testified without regard to truthfulness, but only to serve his own interest.

Respondent denied that Lieutenant Brennan warned him of his constitutional rights prior to the formal written statement (C-1) (N. T. 110, 112). This attempt to belie documentary evidence (N. T. 422-423) must surely fail. Respondent first said that he read "some" of the note (D-1) (N. T. 124) but later denied that he read the note (N. T. 163). He acknowledged being aware of his right to remain silent (N. T. 125) and knew that was on the note (N. T. 110).

The testimony of Brennan and Lottier is firm that respondent indicated that he *wanted* to give a statement (N. T. 434, 491).

Marie Davis related to the court that on Monday afternoon, April 4, 1966, she was at home with her small daughter when the police broke down her door, acted rudely, searched the apartment, and threatened her with arrest and her daughter with a foster home (N. T. 9-33). Mrs. Davis was interviewed by Captain Ferguson and then transported to the Homicide Division at Police Headquarters (N. T. 166-167). She asserted that the police questioned her constantly from 5:00 p.m. to 1:00 a.m. (N. T. 169), and that she was threatened with jail if she did not take a lie detector test (N. T. 17). She was, she said, pushed in front of her husband for a "flash" (N. T. 173). Marie Davis said that at some point she talked to her husband and pleaded with him to help her and keep her out of jail (N. T. 175-176). She testified that she was threatened to take a lie detector test or go to jail (N. T. 178) yet she admitted that she signed an agreement expressing her willingness to take a lie detector test voluntarily and without duress or coercion (C-2) (N. T. 182).

Two police officers, Ernest Sanders and Sergeant Bernard Small, testified to impeach Marie Davis. Both officers had been to her home on the afternoon of April 4, 1966, and had transported her to Police Headquarters. They specifically denied her allegations that the door was broken down and her child was threatened. Officer Sanders in fact remembered that they had met Mrs. Davis on the street and she admitted the officers into the house (N. T. 340-345). Sanders did not partake of the search of the house or of an interrogation of Marie Davis (N. T. 345). Sergeant Small specifically denied that Marie Davis was ever threatened with regard to her baby's safety or well being (N. T. 415).

Lieutenant Brennan further impeached Mrs. Davis' testimony as reflected with what she told Brennan in an interview on April 4, 1966 (C-4). Marie Davis over and over volunteered statements to Lieutenant Brennan about "Butch" (N. T. 387, 391-394). Sergeant Small also noted that she talked about "Butch" (N. T. 414-415). Yet Marie Davis under oath denied ever knowing a "Butch" (N. T. 13, 21). She also had told Brennan the gun was found in her husband's drawer (N. T. 395) but denied such knowledge under oath (N. T. 209).

Although respondent contended at the pre-trial suppression hearing, at trial, and in his brief in the court below that he gave his confession solely because of the threats to his wife, it is uncontradicted that neither defendant nor his wife at any time complained to any police officer of the alleged mistreatment of the wife. Although it is inconceivable that such terrible threats and actions would be forgotten in a few hours, there was no complaint to any one. (Lieutenant Brennan, N. T. 394; Sergeant Lee, N. T. 263; LoRusso, 229-230; Small, N. T. 407-417 *passim;* Captain Lottier, N. T. 461-462).

When this case was presented to the Supreme Court of Pennsylvania, respondent's position was, as it had been in the court below, that there had been a failure to comply with this Court's decision in *Miranda v. Arizona,* 384 U. S.

436 (1966), in that, (1) respondent, although told that he could consult with an attorney before the interrogation, was not told that he could have an attorney with him during the taking of the statement, and, (2) although respondent actually had counsel representing him, the interrogators should have but did not warn him of his right to appointed counsel. Counsel further argued that the confession was involuntary. The Commonwealth answered that the factual issues presented in the case had been resolved against respondent by the suppression judge and again by the trial jury who had been fully and correctly instructed as to the applicable law, since both the suppression judge and the trial judge were aware of and followed this Court's decisions in *Johnson v. New Jersey*, 384 U. S. 719 (1966), and *Davis v. North Carolina*, 384 U. S. 737 (1966).

Following briefs and oral argument in the present case, the Supreme Court of Pennsylvania decided in the case of *Commonwealth v. Singleton*, 439 Pa. 185 (1970), that where the defendant was told that anything he said could be used "for or against him," the confession which followed was obtained in violation of *Miranda* as a matter of law. Since Chief Justice Bell, concurring and dissenting in *Singleton*, cogently observed that regardless of the *Miranda* questions, the extensive interrogation and the youth of the defendant rendered the statement inadmissible, the Commonwealth sought neither reargument nor certiorari to this Court in that case. But, when the Supreme Court of Pennsylvania decided the present case, it disregarded the issues briefed and argued by the parties and simply applied its *Singleton* rule to bring about an automatic reversal. Since this record, unlike the record in *Singleton* itself, presented a good basis for challenging the *Singleton* rule both because respondent Davis had earlier been told simply that anything he said would be held against him and because his age and experience and the whole record in the case established that no problem of involuntariness existed, the Commonwealth petitioned the Pennsylvania Supreme Court for reargument, discussing for the first time the additional

issues now presented to this Court. Specifically, the Commonwealth stressed the fact that respondent at no time had claimed that the use of the words "for or against him" had ever in any way motivated his confession, a fact which respondent never disputed. Moreover, the attention of the Pennsylvania court was called to the only prior decisions which had considered the question of the "for or against" language and pointed out to that court that it was in direct conflict with these federal decisions. Nevertheless, the court denied reargument.

Because of the importance of the questions presented in the court below with respect to both the large number of confessions obtained before this Court's *Miranda* decision but used at trials after *Miranda*—confessions whose validity continues to be challenged on direct and collateral appeals—and equally large number of confessions being obtained by police officers who give the *Miranda* warnings by memory because they are called upon to act at a time when they do not have their "*Miranda* cards" with them, the Commonwealth of Pennsylvania seeks certiorari to permit this Court to clarify the degree to which failure to follow the exact language prescribed in *Miranda* makes confessions inadmissible as a matter of law. At the same time, this case would permit the resolution of the increasingly vexing question of the admissibility of statements obtained from defendants after full *Miranda* warnings to and waiver by the defendant but without notice to previously obtained counsel. Finally, should the court choose to do so, this case would present an opportunity to further clarify the questions of retroactivity of *Miranda* which remain despite decisions in *Davis v. North Carolina*, 384 U. S. 737 (1966), *Jenkins v. Delaware*, 395 U. S. 213 (1969), and *Johnson v. New Jersey*, 384 U. S. 719 (1966).

REASONS FOR ALLOWING THE WRIT.

I. WHEN RESPONDENT WAS TOLD IN AN INTERROGATION ON APRIL 4, 1966, "DO YOU UNDERSTAND THAT ANYTHING YOU SAY OR SIGN IN THIS STATEMENT MAY BE USED FOR OR AGAINST YOU AT THE TIME OF YOUR TRIAL?", THE JUDGE AT RESPONDENT'S JACKSON-DENNO HEARING DID NOT ERR IN HOLDING THAT THIS COURT'S RULING IN MIRANDA v. ARIZONA HAD BEEN COMPLIED WITH.

The first question presented in this petition concerns the interpretation of this Court's opinion in *Miranda v. Arizona*, supra: Specifically, the question presented is whether this Court in setting forth rights of which defendants must be warned and which must be waived by them before their confessions are admissible against them at trial was also setting forth a formula which must be followed unerringly on pain of the exclusion of these statements, or whether, having clearly held that certain rights must be knowingly and intelligently waived before a defendant's statement could be used against him, was merely setting forth illustrative language for determining whether such a waiver existed.

This issue has vexed the lower federal courts and the state courts almost since the day *Miranda* was decided. But, whereas this Court has spoken since *Miranda* to clarify questions concerning the retroactivity of *Miranda*, see *Jenkins v. Delaware*, 395 U. S. 213 (1969), and the meaning of the custody requirement which triggers the need for the *Miranda* warnings, see *Orozco v. Texas*, 394 U. S. 324 (1969), it has had no occasion to clarify the issue of whether non-wilful deviation from the exact language of the warnings prescribed in the *Miranda* opinion is fatal to the admissibility of a statement. And, while initially the issue was posed primarily in cases where the warnings had been

given before the *Miranda* opinion had been announced or before the police had become familiar with its exact language, increasing numbers of cases continued to appear in which oral warnings given without benefit of the ubiquitous "*Miranda* cards" have failed to follow the exact language of *Miranda* (or where the witnesses cannot testify with absolute assurance that they followed its exact language) or where defendants have sought to interpret the *Miranda* opinion to require fifth, sixth, seventh or more warnings beyond the universally recognized four within the *Miranda* opinion.

Although the earliest cases dealing with less than perfect warnings of *Miranda* rights center on the question of right to free counsel, see e.g., *Coyote v. United States*, 380 F. 2d 305 (10th Cir. 1967), the majority of recent cases have concerned the question of the wording used in informing defendants of the consequences of making a statement.

In the course of its *Miranda* opinion, this Court referred to the fact that a defendant must be made aware that anything he says *may* be used against him, 384 U. S. at 444, see 483, 486-88, 489, *can* be used against him, 384 U. S. at 471, and *can and will* be used against him, 384 U. S. 469. Defense counsel have repeatedly urged that only the "can and will" formula is acceptable. But this conclusion has normally been rejected by the courts. See, *e.g., United States v. Johnson*, 426 F. 2d 1112 (7th Cir. 1970); *Davis v. United States*, 425 F. 2d 673 (9th Cir. 1970); *United States v. Grady*, 423 F. 2d 1091 (5th Cir. 1970); *United States v. Sanchez*, 422 F. 2d 1198 (2d Cir. 1970); *State v. Davis*, —— W. Va. ——, 172 S. E. 2d 569 (1970); *State v. Briggs*, 469 P. 2d 73 (N. M. App. 1970); *State v. Humphreys*, —— Ore. ——, 444 P. 2d 476 (1968).

In the present case, yet another formulation was presented. Respondent was warned that anything he said may be used against him at the time of his trial but was told, in addition, that what he said might be used for him. The Pennsylvania Supreme Court held that this information

rendered the *Miranda* warnings unsatisfactory *as a matter of law* because of the inducement it gave the defendant to make a statement.[3] In so holding, the court relied on nothing but its interpretation of this Court's language in *Miranda*. It did not discuss any case which supported its position, presumably because no such case existed. Moreover, it did not discuss the only decisions in the area which had considered the question.

Directly on point and directly to the contrary to the Pennsylvania court's decision is the decision of the United States District Court in *Farmer v. Payton*, 267 F. Supp. 517 (W. D. Va. 1967), which involved a conviction in the Virginia state courts. The Court said (267 F. Supp. at 520):

> The arresting officers and the Commonwealth's attorney testified that they advised petitioner that he did not have to make any statement, but that any statement made could be used "for" or against him. Such statements merely advised petitioner of his constitutional rights and there is no evidence to show that petitioner was in any way misled as to how the statement would be used "for" him. It seems almost trite to rule

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[3] It is, of course, clear that **as a matter of fact** the Commonwealth might have failed to prove waiver because of any mistake in the giving of the **Miranda** warnings, just as it might have failed to prove waiver because the defendant misunderstood the warnings although they were correctly given. But in the present case the factual issue has been resolved in favor of the Commonwealth since respondent never for a moment alleged that his statement was induced by the incorrect formulation of the warning, the statement was not an attempt at self-exculpation, and the suppression judge, therefore, properly found that the confession did not result from this alleged error. Moreover, although it is clear that statements are sought by the police and primarily used against their makers, it is also clear that there are circumstances under which such statements may, in fact, benefit a defendant. Not only could the statement be used at trial as a prior consistent statement should the prosecution claim that the defendant in testifying was relating a recently fabricated story, but, more practically, the revelation to the police of exculpatory information could on occasion lead them away from the investigation of an innocent suspect.

> that advising petitioner that his statement might be used for or against him, did not make the confession involuntary.

It should be noted that *Miranda* was fully considered in the court's opinion.

Equally persuasive and equally disregarded is the opinion of the United States Court of Appeals for the Tenth Circuit in *Green v. United States*, 386 F. 2d 953, 956-957 (10th Cir. 1967), wherein that court said:

> Appellants next assert that oral statements and handwriting specimens given by appellants during interviews by the postal inspector do not meet the requirements of Miranda v. State of Arizona, 384 U. S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694, and other applicable standards for admission in evidence. Particular emphasis is leveled against the failure of the inspector to warn appellants that their statements could be used in court "against them" although admittedly they were informed that such statements could be used in court. This contention, as well as others made in similar vein, is not well taken for as this court said in Coyote v. United States, 380 F. 2d 305, at 308:
>
> > "Surely Miranda is not a ritual of words to be recited by rote according to didactic niceties. What Miranda does require is meaningful advice to the unlettered and unlearned in language which he can comprehend and on which he can knowingly act. We will not indulge semantical debates between counsel over the particular words used to inform an individual of his rights. The crucial test is whether the words in the context used, considering the age, background and intelligence of the individual being interrogated, impart a clear, understandable warning of all of his rights."

In fact, the two federal courts which have faced the question of the effect of surplusage in the *Miranda* warnings have held that such unnecessary and possibly mislead-

ing extra language does not result in making a statement inadmissible as a matter of law. Thus, in *Rivers v. United States,* 400 F. 2d 935 (5th Cir. 1968), and additional warnings to the defendant that he should tell the truth did not destroy the effectiveness of the *Miranda* warnings themselves. And, in *DeLaFe v. United States,* 413 F. 2d 543 (5th Cir. 1969), the mention of a distant and comparatively unavailable public defender did not destroy the effectiveness of the warning that free counsel would be supplied before any statement was taken if the defendant so desired. Thus, these cases are in clear conflict with the entire approach used by the Pennsylvania Supreme Court here and illustrate the importance of a definitive opinion from this Court concerning the interpretation of its *Miranda* opinion.

It is, of course, clear that no number of opinions from this Court can resolve the factual questions presented under *Miranda.* Time and again defendants will urge with varying success that, no matter what warning they were given, they did not knowingly and intelligently waive their rights. What this Court can do is resolve the growing confusion as to the degree that factual determinations must be overturned because of minor imperfections in the giving of the *Miranda* warnings.

II. WHEN RESPONDENT WAS TOLD OF HIS RIGHT TO CONSULT WITH COUNSEL, INCLUDING HIS RETAINED COUNSEL, PRIOR TO GIVING HIS STATEMENT AND ANSWERED THAT HE DID NOT WISH TO CONSULT WITH COUNSEL AT THAT TIME, THE SUPPRESSION JUDGE DID NOT ERR IN DETERMINING THAT RESPONDENT WAIVED HIS RIGHT TO COUNSEL AT THE STATEMENT UNDER MIRANDA.

The question of whether the police may properly take a statement from a counseled defendant in the absence of

counsel but after a full and complete waiver of counsel has likewise come to vex state and federal courts increasingly since the *Miranda* decision. Thus, while the Commonwealth of Pennsylvania does not disagree with the resolution of this question in the courts below—the suppression court having held the waiver proper and the Supreme Court of Pennsylvania having reversed on other grounds without any reference to this issue—the existence of this issue in the case presents yet another reason why this case is worthy of review.

As was noted in the statement of the case, respondent had available to him his privately retained counsel who warned him not to make a statement. Nevertheless, he chose to make a statement after having been informed that he had a right to have his lawyer present and to consult with his lawyer before he made any statement.

The extent of the conflict which is developing on this question is visible in *People v. Robles,* —— N. Y. 2d ——, 8 Cr. L. 2064 (September 21, 1970). There, a deeply divided Court of Appeals of New York upheld waivers taken in the absence of counsel. But the dissenting opinions of Judges Breitel and Fuld indicate the increasing conflict in this area. On the other hand, the Commonwealth of Pennsylvania has strong support for its position that waivers may properly be given even after counsel has entered the case. See, *e.g., United States v. Crisp,* —— F. 2d ——, 8 Cr. L. 2153 (5th Cir., November 10, 1970), *cf. United States v. Plata,* 361 F. 2d 958, 961 (7th Cir. 1966).

Certainly, the police have no duty to try to persuade a defendant not to waive his known rights or to bring back a defendant's attorney in the hopes that he can persuade the defendant not to waive his rights. Under circumstances far less favorable to the prosecution than those in the present case, federal courts have upheld the right of the prosecution to take statements in the absence of known counsel provided only that the defendant had knowingly and intelligently waived the right to such counsel. See,

e.g., Wilson v. United States, 398 F. 2d 231 (5th Cir. 1968); *Coughlan v. United States,* 391 F. 2d 371 (9th Cir. 1968); *Morris v. Cupp,* 297 F. Supp. 234 (D. Ore. 1968). If the prosecutors were justified in believing in the propriety of waivers in those cases, how much more so the police in the present case, where defendant specifically told them, after being permitted to talk to his attorney, that he wished to disregard his lawyer's advice and confess.

Nevertheless, absent a holding from this Court to the contrary, defendants will continue to urge the suppression of every confession obtained under these circumstances.

III. WHEN RESPONDENT'S CONFESSION WAS GIVEN BEFORE THE MIRANDA DECISION AND THAT DECISION INTERVENED BEFORE TRIAL, THE CONFESSION SHOULD BE HELD ADMISSIBLE DESPITE MINOR DEVIATION FROM THE WARNINGS ENUNCIATED IN MIRANDA SINCE RESPONDENT DOES NOT CONTEND THAT THE CONFESSION DID AND THE EVIDENCE CLEARLY INDICATES THAT THE CONFESSION DID NOT RESULT FROM THE DEVIATION IN THE WARNINGS OCCASIONED BY THE INTERROGATORS' FAILURE TO ANTICIPATE WITH PERFECT ACCURACY THIS COURT'S FORMULATION OF THE MIRANDA WARNING.

The argument in the preceding sections of this brief turn on the belief that this Court in deciding *Miranda* did not intend to create a straight-jacket formula which would rule out confessiions *as a matter of law* where the warnings met the substance of the *Miranda* decision but not the exact language, at least where the failure to follow the *Miranda* language was not a wilful and intentional evasion of this Court's guidelines intended to increase the likelihood of a confession being given. But it is certainly clear that this

same argument applies with even greater force to those cases in which the confession was made before the prophylactic requirements of specific warnings were set forth by this Court in its *Miranda* opinion.

The circumstances in this case certainly indicate that respondent's confession was not given in a mistaken attempt to exculpate him from the consequences of his actions based on a belief that what he said could be used "for" him. Not only was the statement not an exculpatory one, but respondent specifically alleged his reasons for confessing and these reasons did not include the technical imperfection of the warning concerning the potential use of his statement. Moreover, counsel in briefs and arguments at both trial and appellate level in the state courts never claimed any relationship between the faulty warning and respondent's confession. Thus, it is clear that the failure to anticipate *Miranda* in no way brought about respondent's confession.

The *Miranda* opinion unquestionably had a dual basis: First, the Court sought to exclude confessions obtained without a knowing and voluntary waiver of all of the constitutional rights of the person making the confession before the confession could be admitted. Second, however, this Court determined that it was impossible to guarantee that the intelligence and voluntariness of the waiver could be correctly determined unless the person making the confession had been warned before he confessed of all of the rights which he was waiving, and, accordingly, this Court set forth a series of warnings which should precede all confessions.

Once the Court had determined that such a multi-purpose decision was required, it was faced with the difficult question of the degree of retroactivity which should be given to the decision. On the one hand, the direct constitutional basis of the decision argued for complete retroactivity; on the other hand, the creation of a specific series of warnings to implement the underlying constitutional basis of the

case, threatening as it did the likelihood of wholesale disruption of the criminal process because police and prosecutors had failed to anticipate the specific guidelines which the Court did set down, argued equally strongly for prospective application only.

Faced with this dilemma, the Court developed a theory of partial retroactivity. With respect to those cases which had not yet come to trial at the time *Miranda* was decided, the *Miranda* holding and guidelines were made applicable directly. *Johnson v. New Jersey,* 384 U. S. 719 (1966). On the other hand, with respect to those cases which had come to trial prior to the decision in *Miranda,* the absence of *Miranda* warnings was made one factor among many to be considered by the courts in weighing the voluntariness of confessions. *Davis v. North Carolina,* 384 U. S. 737 (1966).

With respect to those confessions obtained after *Miranda* and those cases tried before *Miranda,* this solution posed no problem. With respect, however, to those cases tried after *Miranda* involving confessions obtained before *Miranda,* the decision to apply *Miranda* in absolute form has proven disastrous to prosecutors, leading to the reversal of convictions based upon wholly voluntary confessions because the police failed to anticipate with exactitude the *Miranda* guidelines. Thus, for example, with respect to confessions like that in this case, where respondent had private counsel and waived his presence, or cases of confessions obtained after minimal interrogation in the presence of their family, friends, ministers, social workers, or other supportive people the only question which a court could ask was whether the defendant was in custody. Once it was determined that he was, the confession was excluded from a post-*Miranda* trial no matter how voluntary and no matter how strong the good-faith actions of the police were if they had not anticipated *Miranda* with exactitude.

In a great number of cases, this result may well have been completely appropriate. Thus, where a defendant was indigent and his confession obtained after extensive ques-

tioning with few or no warnings and under conditions similar to those decried in the *Miranda* opinion, it may not have been improper to exclude the confession despite its possible admissibility under *Davis* standards. But the fact that retroactivity was appropriate in some—perhaps many or most—cases still awaiting trial at the time of *Miranda* does not argue that it was appropriate in all such cases.

Accordingly, the decision in *Johnson v. New Jersey,* should be modified to create a third category of cases, separate both from those tried before *Miranda* and those where the confession was obtained after *Miranda.*[4] In this intermediate group of cases, it may well be appropriate to *presume* that a confession obtained without absolute compliance with *Miranda* is involuntary. But this presumption should be subject to rebuttal where the state can prove that the confession resulted not from any police tactics aimed at obtaining the confession but from the defendant's free choice to confess after being informed of his rights and waiving those rights.

Such a three-level test would satisfy all of the aims of *Miranda* since it would fairly assure that the purpose of *Miranda* was satisfied in all trials which followed *Miranda.*

This analysis draws further strength from the more recent decisions of this Court concerning the retroactivity of constitutional overruling decisions. With respect to *Miranda* itself, this Court in *Jenkins v. Delaware,* 395 U. S. 213 (1969), refused to apply *Miranda* directly to the re-trial after *Miranda* of cases first brought to trial before *Miranda,* although it applied it indirectly through *Davis.* The Court, discussing the difficult decision concerning retroactivity which it had faced in *Johnson,* compared the *Johnson* decision with other approaches it had taken in setting standards of retroactivity. It said (395 U. S. at ——, 89 S. Ct. at 1680-81):

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[4] The United States Court of Appeals for the Second Circuit reached a similar conclusion in **United States v. Vanterpool,** 394 F. 2d 697 (2d Cir. 1968).

> In *Johnson,* after considering the need to avoid unreasonably disrupting the administration of our criminal laws, we selected the commencement of trial as determinative. We of course could have applied *Miranda* to all judgments not yet final, although they were obtained in good-faith reliance upon constitutional standards then applicable. See Linkletter v. Walker, 381 U. S. 618, 85 S. Ct. 1731 (1965). As we pointed out, however, that choice "would [have] impos[ed] an unjustifiable burden on the administration of justice." 384 U. S., at 733, 86 S. Ct., at 1781. On the other hand, we could have adopted the approach we took in *Stovall* and *Desist* and made the point of initial reliance, the moment the defendant is interrogated, the operative event. See W. Schaefer, *supra,* at 646. But in an effort to extend the protection of *Miranda* to as many defendants as was consistent with society's legitimate concern that convictions already validly obtained not be needlessly aborted, we selected the commencement of the trial. Implicit in this choice was the assumption that, with few exceptions, the commission and investigation of a crime would be sufficiently proximate to the commencement of the defendant's trial that no undue burden would be imposed upon prosecuting authorities by requiring them to find evidentiary substitutes for statements obtained in violation of the constitutional protections afforded by *Miranda.*

Implicit in this language is the realization that even the partial retroactivity given to *Miranda* by *Johnson* posed serious problems for prosecutors and should be limited to those cases where the confession and investigation were fresh at the time of *Miranda.*

It seems equally clear that where, as here, the Commonwealth was relying on a confession which complied with *Miranda* in every substantial sense and where the only non-compliance lay in the presence of an additional state-

ment, meaningless on the facts of this case, that respondent's statement might be used "for" as well as against him, that the Commonwealth had a right to rely upon the confession, and the reversal of the case four years after *Miranda* by the Pennsylvania Supreme Court on the basis of an interpretation of *Miranda* not required by the *Miranda* decision places the Commonwealth in a position similar to that faced by the state in *Jenkins*. This is not to say that *Miranda* does not apply to this case; it is merely to urge that the Commonwealth has a right to prove by independent evidence that the technical failure in giving one *Miranda* warning was meaningless in this case where the failure represented not a willful disregard of the holding of this Court but a failure to anticipate such a holding and where the confession was clearly voluntary following a proper waiver of constitutional rights.

In urging that this Court permit the prosecution to establish by independent evidence that a pre-*Miranda* warning satisfied and sufficiently anticipated the requirements of *Miranda*, the Commonwealth's arguments are in keeping with the more recent decisions of this Court on retroactivity which have avoided the problems caused by the partial retroactivity given to *Miranda* by *Johnson*. See, *e.g.*, *Stovall v. Denno*, 388 U. S. 293 (1967); *Desist v. United States*, 394 U. S. 244 (19); *DeStefano v. Woods*, 392 U. S. 631 (1968); *Halliday v. United States*, 394 U. S. 831 (1969); *Fuller v. Alaska*, 393 U. S. 80 (1969). It is equally appropriate for this Court, as it did in *Jenkins*, to interpret narrowly the *Miranda* decision insofar as it is to be applied retroactively.

Thus, the Commonwealth should have been permitted to introduce the respondent's confession because of the overwhelming evidence that the confession was not motivated by any of the coercive factors which brought about the *Miranda* decision but that it was, in fact, given voluntarily by respondent after he knowingly and intelligently waived all his constitutional rights. To the degree that *Johnson v.*

New Jersey would require the exclusion of this confession because of non-substantial technical failure to comply with the exact form of the *Miranda* guidelines which had not yet been laid down at the time the statement was given, *Johnson* should be modified to permit the state to prove that the confession was a product not of police interrogation but of respondent's desire to confess, a desire which he stated to the police before he even became a suspect.

CONCLUSION.

For the foregoing reasons, the Commonwealth respectfully requests that this petition for writ of certiorari be granted.

Respectfully submitted,

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RICHARD A. SPRAGUE,
First Assistant District Attorney,
ARLEN SPECTER,
District Attorney.

Appendix

OPINION ON MOTION TO SUPPRESS STATEMENT.

KELLEY, J.

The defendant, Manasee Davis, is accused of a murder which allegedly occurred on April 1, 1966. The defendant was arrested on April 4, 1966, and preliminarily arraigned on April 5, 1966. Pursuant to the Pennsylvania Rules of Criminal Procedure Nos. 323 and 324, the accused filed an application for suppression of a statement which, it is alleged, was secured from him against his will and obtained when he was unlawfully denied the assistance of counsel.

The defendant, Manasee Davis, was taken into custody on April 4, 1966 and was represented by counsel at that time. Counsel finding himself unable to remain with the defendant because of the observance of an important religious holiday (Passover), handed to the defendant a note which was to be given to the police. The note stated that counsel had instructed his client not to answer any questions, and this note was duly delivered by the defendant to the police at their headquarters at 8th & Race Streets, Philadelphia. Later that evening, after the police brought his weeping wife into his presence and the defendant and his wife conferred alone, the detectives further questioned the defendant and were given a statement by him.

The issues raised by the suppression application are, first, whether the defendant under these circumstances could lawfully be questioned by the police, and, secondly, whether under the factual conditions alleged, was unfair pressure applied to the defendant and did the defendant voluntarily waive his right to counsel, his right to await counsel and his right to remain silent.

It is clear that the defendant was warned by his own counsel of his constitutional rights before any custodial interrogation began. It is also clear that the police gave

the defendant a number of opportunities to contact his attorney.

The court finds that the Commonwealth has met its burden of demonstrating the use of procedural safe-guards effective to secure the privilege against self-incrimination and the right of assistance of counsel as provided for by *Miranda v. Arizona,* 384 U. S. 436 (1966).

The defendant himself is the final arbiter of the conduct of his defense. The defendant may waive his right to counsel and his right to await counsel and to remain silent. *Commonwealth ex rel. Raymond v. Rundle,* 427 Pa. 313 (1967); *Male v. State,* 189 So. 2d 521 (Dist. Ct. of App. Fla. 1966), *cert. denied* 200 So. 2d 313 (Sup. Ct. Fla. 1967), *cert. denied* 88 Sup. Ct. 281, 19 L. Ed. 2d 277 (U. S. Sup. Ct. 1967); and *People v. Baker,* 281 N. Y. S. 2d 161, 28 App. Div. 2d 24 (App. Div. N. Y. 1967), *affirmed* 281 N. Y. S. 2d 527, 19 N. Y. 2d 982 (Ct. of App. N. Y. 1967). Therefore, even with the knowledge of counsel's advice to the defendant, the police were free to take a statement from the defendant if the defendant voluntarily decided to waive his rights and was desirous of making a statement.

Although the issue of voluntariness is difficult in the instant case the court finds that the defendant voluntarily waived his right to counsel, his right to await counsel and his right to remain silent. The statement of the defendant given to the police was voluntary and was not the product of force, coercion or intimidation.

Therefore, we deny the application to suppress the statement of the defendant, Manasee Davis.

ORDER.

AND NOW, to wit, this 4th day of January, 1968, it is hereby ordered and decreed that the application to suppress the statement of the defendant, Manasee Davis, is denied.

BY THE COURT,
/S/ KELLEY, J.

OPINION ON MOTIONS FOR A NEW TRIAL AND IN ARREST OF JUDGMENT.

NIX, J.

The defendant was arrested and indicted for his alleged participation in an armed robbery which resulted in the death of a hotel desk clerk on April 1, 1966 in the City of Philadelphia. Prior to the trial of the matter, the defendant filed an application to suppress statements which were allegedly secured from him against his will and obtained while he was unlawfully deprived of the assistance of counsel. Hearings were held on the application on July 6 and on September 26 and 27, 1967 before the Honorable Bernard J. Kelley. On January 4, 1968, Judge Kelley filed an opinion and order denying the request.

Pursuant to Pennsylvania Rules of Criminal Procedure rule 323(b),[1] this trial court admitted the statement and permitted the defendant to offer evidence at trial on the issue of whether the confession was made voluntarily.[2] In addition to permitting the testimony by the defense as to whether the defendant received his constitutional warn-

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[1] The trial was before the effective date of the November 25, 1968 amendment.

[2] The jury was charged that the Commonwealth had to establish the voluntariness of the statement beyond a reasonable doubt, N. T. p. 611, in accordance with **Commonwealth v. Williams,** 197 Pa. Super. 184 (1962), at p. 197. See 68 **Temple L. Rev. 60.** But see **Commonwealth ex rel. Butler v. Rundle,** 429 Pa. 141 (1968).

ings to be considered in determining the issue of voluntariness,[3] the court also instructed the jury that if they were not convinced beyond a reasonable doubt that the defendant was advised of his right to remain silent and to have the assistance of counsel and that he intelligently waived these rights, they were to disregard the statements. See N. T. pp. 607-609.

The jury subsequently found the defendant guilty of first degree murder and set the punishment at life imprisonment. At the time of the argument on the motion for new trial, counsel for the defendant stated for the record the only ground upon which they relied for relief was the introduction of the evidence which was the subject of the suppression hearing. Counsel further stated that they made no further assignment of error.

The Commonwealth urged the court to deny the motions on the authority of *Commonwealth v. DeMichel,* 214 Pa. Super. 392 A. 2d (1968), asserting that this case stands for the proposition that the trial judge is precluded at any stage from reviewing the decision of the pretrial court. While it is true that the holding of the *DeMichel* decision, *supra,* referred specifically to an order dismissing a petition to suppress evidence under Pennsylvania Rule of Civil Procedure 2001, the opinion nevertheless interpreted Rule 324 as clearly precluding the raising of the pretrial issue at the trial level.

> "Rules 324 and 2001 have the identical objective of expediting trial proceedings through pretrial disposition of evidentiary questions. As this objective would be wholly frustrated if relitigation is permitted we have no difficulty in finding that a 'final disposition' under Rule 2001, as under Rule 324, is a conclusive litigation binding in all further proceedings at the trial level. Accordingly, it was error for the court

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[3] **Davis v. N. C.,** 384 U. S. 737 (1966); **Commonwealth ex rel. Storch v. Maroney,** 363 F. 2d 149 (3d Cir. 1966); **Commonwealth ex rel. Mumford v. Cavell,** 423 Pa. 280, 223 A. 2d 852 (1966).

below to entertain the motion in arrest of judgment on the ground of the use of illegally seized evidence." *Commonwealth v. DeMichel, supra* at p. 396.

There seems to be little question that the *DeMichel* reasoning would also necessarily apply to proceedings under Section 323.

Under the November 25, 1968 amendment of Rule 323, which became effective February 3, 1969, it is clear that it was the intention of the framers of the rule to accomplish the same degree of finality in both section 323 and 324, the only exception being to allow for the long standing practice in Pennsylvania to permit the jury also to pass on the question of voluntariness of the statement as well as its credibility.

In conformity with the directions of the *DeMichel* case and Rules 323 and 324, this court did not at trial and will not in this opinion pass upon the propriety of the pretrial ruling.

/S/ NIX, J.

Date filed: 10-17-69.

OPINION OF THE SUPREME COURT OF PENNSYLVANIA.

OPINION PER CURIAM, October 9, 1970:

On May 6, 1968, the appellant, Manasee Davis, was convicted by a jury in Philadelphia of murder in the first degree, and punishment was fixed at life imprisonment. Following the denial of a motion for a new trial, sentence was imposed in accordance with the jury's verdict. This appeal was then filed.

Davis was taken into police custody about 1:00 p.m. on April 4, 1966, in connection with a robbery-murder committed on April 1st. About 3:30 a.m. on April 5th, he made an incriminating statement which was recorded on a type-

writer. The incriminating statement occurred during police questioning while Davis was without the assistance of legal counsel, although such counsel had previously been retained and the police were aware of this fact. A pretrial motion to suppress this evidence was denied, and it was admitted at trial over objection.

The trial occurred subsequent to the effective date of *Miranda v. Arizona*, 384 U. S. 436, 86 S. Ct. 1602 (1966), and hence, unless Davis was fully informed of his constitutional rights before the questioning commenced as *Miranda* requires, evidentiary use of the statement violated due process. *Johnson v. New Jersey*, 384 U. S. 719, 86 S. Ct. 1772 (1966).

As to possible use of the statement against him at trial, the warning given to Davis, according to the police, was as follows: "Do you understand that anything you say or sign in this statement may be used *for or against you* at the time of your trial?" (Emphasis added.) This warning failed to comply with the standards mandated by *Miranda*. *Commonwealth v. Singleton*, 439 Pa. 185, 266 A. 2d 753 (1970).

Judgment reversed and a new trial ordered.

Mr. Chief Justice BELL and Mr. Justice JONES dissent.